IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 876

EDDIE M. HARRISON,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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Opinion Below

The opinion of the Court of Appeals (A. 69) and the opinion on rehearing (A. 88) are not yet reported. Prior opinions (A. 11, 26) are reported at 359 F.2d 214.

Jurisdiction

The judgment of the Court of Appeals (A. 87) was entered on May 18, 1967. A petition for rehearing was denied on August 1, 1967 (A. 88). The petition for a writ of cer-

tiorari was filed on August 25, 1967, and was granted on December 4, 1967 (A. 91). The jurisdiction of this Court rests on 28 U.S.C. § 1254.

Constitutional Provisions Involved

Amendment V, Constitution of the United States

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI, Constitution of the United States

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Questions Presented

1. Whether incriminating testimony extracted from the petitioner by erroneous admission of illegally obtained confessions could be read to the jury at a retrial from which the confessions had been excluded.

2. Whether 45 months' delay of the petitioner's case by Court of Appeals deliberations, and more than seven years' total delay, violated his right to a speedy trial.

Statement

The petitioner Eddie M. Harrison is serving a life sentence imposed following his third conviction of felony murder in the District Court for the District of Columbia (A. 67). The only significant evidence against him at this trial was his own testimony from a previous trial, which was read to the jury by the prosecutor as part of the Government's case (A. 47). That testimony had been given by the petitioner to rebut confessions used against him in his prior trials but subsequently held inadmissible by the United States Court of Appeals for the District of Columbia Circuit (A. 26). The petitioner did not testify at the third trial, and objected to admission of his testimony from the prior trial on grounds that it was "fruit of a poisonous tree" and its use compelled him to be a witness against himself contrary to the Fifth Amendment to the Constitution of the United States (A. 48, 60-61, 65). At the outset of this trial and on previous occasions he had also objected that this trial, which took place more than six years after his indictment, violated his Sixth Amendment right to a

speedy trial (3 Tr. 3).[1] Following conviction these points were also argued to the United States Court of Appeals for the District of Columbia Circuit, which affirmed his conviction (A. 69) and denied rehearing *en banc* over the dissent of Chief Judge Bazelon and Circuit Judge Wright (A. 88).

The testimony objected to admitted that the petitioner had killed one George "Cider" Brown on March 8, 1960. According to this testimony the petitioner Harrison had gone to Brown's home on that morning to pawn a shotgun. While he was lifting the shotgun to show it to Brown, the latter unexpectedly closed the door, which struck the gun, causing it to discharge, though the petitioner did not know it was loaded (A. 47-52, 55).

This testimony had been given by the petitioner Harrison at his first two trials to rebut confessions, introduced by the Government, which said that Harrison and White had gone to Brown's house (with a third defendant, Joseph R. Sampson) to rob him (2 Tr. 507).[2] Harrison had alleged at these trials that the confessions were false and had been obtained by threats on the part of a police officer while Harrison was being held without counsel, but the trial court

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[1] References to "3 Tr." are to the Reporter's transcript of the third trial which is in the record in this Court. The facts of this trial are also reported in some detail in the opinion below (A. 69). The only portion of this transcript that has been printed in the Joint Appendix is the reading of the former testimony of the petitioner Harrison (A. 47). The written motion sought to be renewed at Tr. 3 (seeking dismissal for violation of the petitioner's right of speedy trial, among other reasons) is in Volume 3 of the record, which does not have numbered pages.

[2] References to "2 Tr." are to the Reporter's transcript of the second trial which is in the record in this Court but has not been printed in the Joint Appendix.

had allowed the confessions to go to the jury for resolution of this claim (2 Tr. 1328 *et seq.*).

These prior trials had both resulted in convictions that were reversed by the Court of Appeals after protracted and unusual proceedings. The first of these reversals was *sua sponte,* the second was by the court sitting *en banc,* and the circumstances of both require examination because they bear importantly upon the petitioner's claim here that he has been denied a speedy trial.

The case first came to the attention of the Court of Appeals in the spring of 1961.[3] At that time it was discovered that a layman, one Daniel Oliver Wendel Holmes Morgan, had been practicing law in the District of Columbia courts under the name of L. A. Harris, a lawyer who had left the jurisdiction sometime previously. Among the cases in which this impostor had appeared as counsel was the first trial in this case, in which the defendants had been found guilty and sentenced to death, which was the mandatory sentence for felony murder in the District of Columbia at that time. Upon discovery of this fact the Court of Appeals remanded the case to the District Court with instructions to accept and grant motions for a new trial. However, the petitioner Harrison and his co-defendants refused to ask for a new trial because they did not want to waive their right to claim former jeopardy if they were tried again. So the District Court sent the case back to the Court of Appeals without acting. There the matter rested while the Court of Appeals pondered what to do

[3] The facts recited in this paragraph appear in the "Findings of Fact, Conclusions of Law and Order" filed October 4, 1961, by Judge Matthews, which is printed at pages 4-8 of the Joint Appendix.

with three youthful, illegally convicted prisoners on death row who refused to seek the new trial to which they were clearly entitled. Eventually, on June 12, 1962, the court ordered a new trial (A. 15).

That second trial took place beginning in April 1963. It was essentially a re-run of the first trial, only this time with real lawyers for all defendants, appointed by the court. Again the Government submitted the defendants' confessions and they took the stand to rebut them, and again they were convicted (A. 47-52; 2 Tr. 507, 1328 *et seq.*). This time they were sentenced to life imprisonment (A. 9), the mandatory death penalty having meanwhile been abolished.

The defendants appealed, and the Court of Appeals eventually reversed their conviction, holding that the confessions used at the first two trials were inadmissible (A. 11, 26; 359 F.2d 214). That appeal was a lengthy one. It was argued on December 18, 1963, and there the matter rested for some 18 months until June 1, 1965, when the court, without having issued an opinion, *sua sponte* ordered rehearing *en banc* on the question of admissibility of one of the confessions involved (A. 12). Six months thereafter, on December 7, 1965, the court issued opinions holding all of the confessions inadmissible (A. 11, 26; 359 F.2d 214).

At this point the case should have been dismissed because there was no significant evidence against the defendants and they had long since been deprived of their right to a speedy trial. However, a third trial was held on May 2, 1966 (3 Tr. 1). This time the trial judge directed acquittal for one of the three, Sampson (3 Tr. 136), but Harrison and White were convicted and again sentenced to life imprisonment (3 Tr. 208).

The trial was an unusual one. There were only three witnesses for the prosecution—a relative who identified the deceased (3 Tr. 7 *et seq.*), a police officer who described the scene of the death (3 Tr. 16 *et seq.*), and a soldier who testified that Harrison had admitted shooting "Cider" Brown, but had not told him the circumstances (3 Tr. 54).

The rest of the trial consisted of the U.S. Attorney's reading to the jury excerpts from the transcript of the previous trial. He read the coroner's description of the death wound (3 Tr. 9 *et seq.*) and the testimony of three other witnesses that (1) Harrison, Sampson and White had borrowed a black Buick one evening (3 Tr. 41-42), (2) the next morning Sampson was seen at the same restaurant as the deceased shortly before his death (3 Tr. 48), and with two other persons in a black Buick outside the restaurant (3 Tr. 49-50), and (3) two unidentified men were seen running down the street away from the deceased's house—one with a shotgun—immediately after a loud blast (3 Tr. 34-36).

At this point in the trial there was no proof of felony murder. The only way such a case could be made was through the confessions of the defendants that had been held inadmissible. However, the prosecutor met this deficiency by reading to the jury the testimony of the defendants at their former trial, given to rebut the inadmissible confessions. While this testimony was exculpatory, it was also damning because it admitted the killing, denying only that the defendants had gone to Brown's house intending to rob him (A. 47 *et seq.*). The prosecutor argued that this denial was false (3 Tr. 137 *et seq.*) and the jury agreed.

There followed the unsuccessful appeal below, which finally concluded the prosecution on August 1, 1967, more

than seven years after indictment.[4] The pertinent chronology of the case to date is as follows:

April 19, 1960 —Indictment (A. 1).

April 21, 1961 —Petitioner sentenced to death following first trial (A. 5).

July 21, 1961 —Court of Appeals orders remand with leave for petitioner to ask for new trial following discovery of Morgan's identity (A. 4, 7).

June 12, 1962 —Court of Appeals vacates first conviction and remands (A. 15).

June 14, 1963 —Petitioner sentenced to life imprisonment following second trial (A. 9-10).

July 25, 1963 —Counsel appointed for appeal.

September 16, 1963—Petitioner's brief submitted to Court of Appeals.

December 18, 1963—Case argued to Court of Appeals.

June 15, 1965 —Case re-argued *en banc* to Court of Appeals on one question (A. 12).

December 7, 1965 —Court of Appeals reverses second conviction (A. 11, 26; 359 F.2d 214).

May 13, 1966 —Petitioner sentenced to life imprisonment following third trial (A. 67-68).

August 23, 1966 —Petitioner's brief filed in the Court of Appeals.

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[4] As to the petitioner Harrison. White's conviction was reversed and he has recently been convicted a fourth time, though that fact is not of record in this case.

November 16, 1966—Case argued to Court of Appeals.

May 18, 1967 —Court of Appeals affirms petitioner's third conviction (A. 69).

June 1, 1967 —Petition for rehearing *en banc* filed.

August 1, 1967 —Petition for rehearing *en banc* denied (A. 88).

August 25, 1967 —Petition for certiorari filed.

December 4, 1967 —Petition for certiorari granted (A. 91).

From the foregoing it will be seen that the total delay involved thus far is approaching eight years, of which 57 months were consumed by the appellate process, including 45 months spent on Court of Appeals deliberations. (Eleven months from July 21, 1961, to June 12, 1962, 24 months from December 18, 1963, to December 7, 1965, eight months from November 16, 1966, to May 18, 1967, and two months from June 1, 1967, to August 1, 1967.)

Summary of Argument

I.

When the trial judge allowed the confessions to go to the jury at the second trial, the petitioner Harrison had no real choice but to take the stand to rebut them. The alternative was sure conviction and possible death. Testimony given in such circumstances is not voluntary, and its subsequent use in another trial from which the confessions had been excluded compelled the petitioner to be a witness against himself contrary to his Fifth Amendment privilege to remain silent and put the Government to its burden of

Here the prosecution shouldered no load at all. Eddie Harrison had furnished proof of his guilt in confessions. The Court of Appeals had ruled that proof inadmissible, but that was of no moment. At the previous trial the introduction of the inadmissible confessions had forced Harrison to the witness stand to explain away the confessions, upon pain of certain conviction and possible death. In the words of the *Bram* case, he was "involuntarily impelled to make a statement, when but for the improper influences he would have remained silent." This statement admitted all the elements of the alleged felony murder except intention to rob the deceased, and that the Government was willing to infer. What need was there for the Government in the third trial to shoulder any load since it had available in the transcript of the previous trial the fruits of its prior wrongful use of Harrison's confessions? And why be concerned with the means of obtaining that evidence: after all, wasn't Harrison already twice-convicted and guilty?

To this view there can be but one answer. The prosecutor no less than the police must respect an alleged criminal's Constitutional privilege of silence. See, *e.g.*, *Griffin* v. *California*, 380 U.S. 609 (1965) (comment on silence not allowed); *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964) (silence not contempt); *Murphy* v. *Waterfront Comm'n of N.Y.*, 378 U.S. 52 (1964) (testimony compelled by state, and fruits thereof, inadmissible in federal prosecution). The fact that a defendant has been the loser in previous trials condemned as unfair by the Court of Appeals does not make him guilty or deprive him of the presumption of innocence. That presumption exists until overcome by evidence. And that evidence must be fairly and lawfully obtained without violation of the rights of the accused. Otherwise the defendant must go free, whether innocent or guilty.

That must be the result here. The sole evidence of any significance here was obtained from the petitioner's own mouth by the Government's wrongdoing. A conviction so obtained cannot be allowed to stand. As Mr. Justice Frankfurter wrote in a similar context in *Walder* v. *United States*, 347 U.S. 62, 64-65 (1954):

> "The Government cannot violate the Fourth Amendment—in the only way in which the Government can do anything, namely through its agents—and use the fruits of such unlawful conduct to secure a conviction. Weeks v. United States (US) supra. Nor can the Government make indirect use of such evidence for its case, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 46 L ed 319, 40 S Ct 182, 24 ALR 1426, or support a conviction on evidence obtained through leads from the unlawfully obtained evidence, cf. Nardone v. United States, 308 U.S. 338, 84 L ed 307, 60 S Ct 266. All these methods are outlawed, and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men."[6]

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[6] *Cf. Culombe* v. *Connecticut*, 367 U.S. 568, 582 (1961); *Rogers* v. *Richmond*, 365 U.S. 534, 540-41 (1961); *Blackburn* v. *Alabama*, 361 U.S. 199, 207 (1960); *Spano* v. *New York*, 360 U.S. 315, 320-21 (1959); *Rochin* v. *California*, 342 U.S. 165, 172-73 (1952); *Watts* v. *Indiana*, 338 U.S. 49, 54 (1949); *Lyons* v. *Oklahoma*, 322 U.S. 596, 605 (1944); *Lisbena* v. *California*, 314 U.S. 219, 236 (1941). See also Griswold, The Fifth Amendment Today, Harvard University Press, p. 7 (1955):

> "I would like to venture the suggestion that the privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilized. As I have already pointed out, the establishment of the privilege is closely linked historically with the abolition of torture. Now we look upon torture with abhorrence. But torture was once used by honest and conscientious public servants as a means of obtaining in-

proving him guilty by legally obtained evidence apart from statements forced from him.

Use of this testimony at the third trial also violated the principle that the Government may not use the fruits of its own wrongdoing to secure convictions. The Court of Appeals held that the petitioner's confessions were inadmissible because they had been illegally obtained. The testimony given to rebut these confessions was obtained by the wrongful use of these confessions at the second trial. This testimony was therefore "fruit of a poisonous tree," inadmissible in a subsequent federal prosecution.

II.

This case, now almost eight years old, has been delayed inordinately, largely by the United States Court of Appeals for the District of Columbia Circuit. Following the petitioner's first trial the case was delayed 21 months of which no more than one month was attributable to the petitioner and at least 11 months of which was due to indecision on the part of the court. Following his second trial the appellate process consumed another 32 months, of which two full years were spent solely on Court of Appeals deliberations. The appeal following the third trial added 15 months to the case when it was already more than six years old, and 10 months of this time was spent on court deliberations. Delay of this magnitude far exceeded that necessary to dispose of this case, cannot be squared with the Sixth Amendment's guarantee of speedy trial, and should not be tolerated by this Court in a federal prosecution.

ARGUMENT

I.

The Trial Court Erred When It Compelled the Petitioner to Be a Witness Against Himself by Admitting in Evidence Statements Obtained From Him at a Former Trial as a Result of Illegal Governmental Action.

The principal witness for the prosecution in this case was the petitioner Eddie Harrison, whose testimony (1) was obtained at a former trial as a direct result of illegal Government action and (2) was admitted in evidence at the trial below over objection that he wished to exercise his Constitutional privilege of not being compelled to be a witness against himself. A conviction so obtained must be reversed. It cannot be squared with the Fifth Amendment or with the principle that the Government is forbidden to use the fruit of its own wrongdoing to secure conviction.

At his second trial Eddie Harrison testified under much the same compulsion as that which gave rise to the earliest assertions of the privilege against self-incrimination in England and the American Colonies: his alternatives were to speak or be sentenced to death or life imprisonment.[5] The Government had introduced into evidence confessions that had led to his being convicted of first degree murder at a prior trial and sentenced to death. He alleged that

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[5] See, *e.g.*, Griswold, The Fifth Amendment Today, Harvard University Press, pp. 2-10 (1955); Williams, One Man's Freedom, Atheneum, pp. 122-129 (1962); Pittman, The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America, 21 Va. L. Rev. 763 (1935); Lowell, The Judicial Use of Torture, Parts I and II, 11 Harv. L. Rev. 220, 290 (1897); Morgan, The Privilege Against Self Incrimination, 34 Minn. L. Rev. 1 (1949).

these confessions were false and had been obtained by threats, but Judge Holtzoff had ruled that this was a question for the jury. Hence Harrison's only hope of avoiding a second conviction by those confessions was to take the stand and deny them, telling the jury his version of the killing of "Cider" Brown—that it was an unfortunate accident during an innocent attempt to pawn a shotgun. So he testified.

Such testimony cannot meet the test of voluntariness established in *Bram* v. *United States,* 168 U.S. 532, 549 (1897), explained by Mr. Justice Brandeis in *Wan* v. *United States,* 266 U.S. 1, 14-15 (1924), and quoted in *Miranda* v. *Arizona,* 384 U.S. 436, 462 (1966). The *Bram* opinion said:

> "The rule is not that in order to render a statement admissible the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influences he would have remained silent. . . . " 168 U.S. at 549.

To this Mr. Justice Brandeis added:

> "In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been

given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise. *Bram* v. *United States,* 168 U.S. 532." 266 U.S. at 14-15.

In extending this standard of voluntariness to extra-judicial interrogation in state proceedings in the *Miranda* case, the Court emphasized the liberal construction to be afforded this privilege against self-incrimination, recalling an earlier admonition that it was "as broad as the mischief against which it seeks to guard." *Counselman* v. *Hitchcock,* 142 U.S. 547, 563 (1892). The opinion was at pains "to assure that the exercise of the right will be scrupulously honored . . . ." (384 U.S. at 479), and emphasized that the privilege applies to exculpatory statements as well as outright confessions (384 U.S. at 476) and that waiver of the right would not be presumed, citing *Escobedo* v. *Illinois,* 378 U.S. 478, 490, n. 14 (1964); *Carnley* v. *Cochran,* 369 U.S. 506, 516 (1962); *Glasser* v. *United States,* 315 U.S. 60 (1942); and *Johnson* v. *Zerbst,* 304 U.S. 458 (1958). 384 U.S. at 475. Further, for explanation of the underlying principle of the privilege the Court cited, among other sources, its recent opinion in *Tehan* v. *Shott,* 382 U.S. 406 (1966), which said that "the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.' "

What could be more obnoxious to free men than the course of the Government in this case? Six years after the alleged crime Eddie Harrison was convicted out of his own mouth with testimony wrung from him at two prior unfair trials by use of inadmissible confessions. Neither the Fifth Amendment nor the integrity of the judicial process permits such a result.

So much has been held by the Supreme Court of California in *People* v. *Polk*, 63 Cal.2d 443, 406 P.2d 641, 47 Cal. Rptr. 1 (1965), *cert. denied*, 384 U.S. 1010 (1966), which involved an issue virtually indistinguishable from the present case. There the defendants had been convicted of first degree murder, and the jury had fixed the penalty at death on the murder count. On appeal the judgments were reversed for a new penalty trial only. Upon retrial the jury again fixed the penalty for each defendant at death. In dealing with the very issue now before this Court—the admissibility of prior testimony in a subsequent proceeding—Justice Traynor had this to say:

> "Defendants' testimony at the trial on the issue of guilt was read into evidence in the second penalty trial. That testimony was impelled by the erroneous admission of the confessions. . . . Consequently, the testimony was inadmissible at any future trial and should have been excluded. Similarly, defendants' testimony

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formation about crimes which could not otherwise be disclosed. We want none of that today, I am sure. For a very similar reason, we do not make even the most hardened criminal sign his own death warrant, or dig his own grave, or pull the lever that springs the trap on which he stands. We have through the course of history developed a considerable feeling of the dignity and intrinsic importance of the individual man. Even the evil man is a human being."

at the second penalty trial will be inadmissible hereafter. That testimony was also impelled, at least in part, by the admission of evidence obtained in violation of Escobedo." 406 P.2d at 645, 47 Cal. Rptr. at 5 (citations omitted).[7]

Thus Justice Traynor dealt squarely with the issue that is the petitioner's principal point of reliance in this case: That testimony compelled by submission of inadmissible evidence cannot be used against a defendant at a subsequent trial. Such a course cannot be reconciled with the Fifth Amendment's prohibition of compulsion nor with the principle that the Government is forbidden to use the fruit of its own wrongdoing to secure convictions. Certainly the opinion below effects no such reconciliation. That opinion disposes of the petitioner's argument on grounds that the Government was not acting in bad faith at the second trial when it obtained testimony as a result of introducing inadmissible evidence (A. 75-76) and that the "appellants were surrounded by the full panoply of legal protections" when their admissions "were rendered in open court . . . induced by an evaluation of the capabilities of the Government's [erroneously admitted] proof to convict" (A. 76). The bracketed words inserted here into the Court of Appeals' opinion are the gist of the argument, and failure to

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[7] See also the following California cases presaging the *Polk* holding: *People* v. *Stockman*, 63 Cal.2d 494, 407 P.2d 277, 47 Cal. Rptr. 365 (1965) (Peters, J.); *People* v. *Davis*, 62 Cal.2d 791, 402 P.2d 142, 44 Cal. Rptr. 454 (1965); *People* v. *Guastella*, 234 Cal. App. 2d 635, 44 Cal. Rptr. 678 (Dist. Ct. App. 1965); *People* v. *Stafford*, 225 Cal. App. 2d 522, 37 Cal. Rptr. 578 (Dist. Ct. App. 1964); *People* v. *Ibarra*, 60 Cal.2d 460, 286 P.2d 487, 34 Cal. Rptr. 863 (1963); *People* v. *Garrison*, 189 Cal. App. 2d 549, 11 Cal. Rptr. 398 (Dist. Ct. App. 1961); *People* v. *Ambrose*, 318 P.2d 181 (Cal. Dist. Ct. App. 1958); *People* v. *Dixon*, 46 Cal.2d 456, 296 P.2d 557 (1956).

deal with them makes the opinion below largely irrelevant. When the prosecutor used inadmissible evidence, it made no difference whether he was acting in good faith—the damning evidence was not rendered harmless by his motives. *Cf. Townsend* v. *Sain,* 372 U.S. 293 (1963). And when the trial court erroneously allowed the evidence to come in, it made no difference that the "appellants were surrounded by the full panoply of legal protections"—the panoply was pierced, the defendant was deprived of the very protection that the trial procedure was supposed to provide, and the compulsion to testify was no less because it was exerted in the courtroom in the presence of his counsel.

To this it is no answer, as the opinion below would have it, that "appellants admittedly made a conscious tactical decision to seek acquittal by taking the stand after their in-custody statements had been let in, and the record reflects an appreciable interval for the interaction of mental processes preceding this decision and the testimonial acts themselves" (A. 77). A man facing a firing squad who is told that he has one hour—or one week—to decide whether he will confess to an alleged crime or be shot, also can make a conscious decision to make self-incriminating statements, and also has time to make up his mind. The analysis begins—not ends—in Harrison's case with his conscious decision to take the stand. The solution to the problem lies in investigating the pressures influencing his choice, and his options.

This Court has long recognized, and recently reaffirmed, that the "choice between the rock and the whirlpool" destroys voluntariness in any meaningful sense.

> "It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." [8]

In this case the duress was clear: the petitioner was forced to choose between the "rock" of sure conviction in view of the Government's use of inadmissible confessions and the "whirlpool" of explaining the admittedly "ambiguous circumstances" [9] of his having shot "Cider" Brown. Under these circumstances, Harrison was anything but a willing witness. He testified, but only under great and improper pressure. And the presence of his attorney could do nothing to help him avoid having to make this fateful choice. As

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[8] *Garrity* v. *New Jersey*, 385 U.S. 493, 498 (1967), quoting *Union Pac. R. Co.* v. *Public Service Comm'n*, 248 U.S. 67, 70 (1918). See also *Stevens* v. *Marks*, 383 U.S. 234, 243 (1966); *Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583, 593 (1926). In *Garrity* the Court held that the Fifth Amendment bars admission in the criminal trial of police officers of statements made by them which had been obtained under a state statute compelling them to answer questions or be discharged from employment. The compulsion in *Garrity*—possible loss of employment—seems pale in comparison to the compulsion felt by Petitioner Harrison, sure conviction for life, and possibly a death sentence. The Court outlawed the statements despite the fact that the *Garrity* petitioners were well advised of the consequences of their speaking or remaining silent. Three of the petitioners had counsel at the time they made their admissions, 385 U.S. at 506 (dissenting opinion), and Mr. Justice Douglas noted in his opinion for the Court that "before being questioned each appellant was warned (1) that anything he said might be used against him in any state criminal proceeding; (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but (3) that if he refused to answer he would be subject to removal from office." 385 U.S. at 494.

[9] "The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." *Slochower* v. *Board of Education*, 350 U.S. 511, 557-58 (1956).

Chief Judge Bazelon wrote in dissenting from denial of rehearing *en banc* below:

> "It seems plain to me, however, that the defendants' decision to testify was compelled by the need to rebut the statements erroneously admitted in evidence. In *Griffin* v. *California*, 380 U.S. 609 (1965), the Supreme Court held that adverse comment by the court or the prosecutor upon a defendant's failure to testify 'cuts down on the [Constitutional] privilege [to remain silent] by making its assertion costly.' In the present case, the cost of exercising the privilege was even greater. The erroneously admitted statements left the defendants with a 'Hobson's Choice': remain silent and allow the jury to consider the highly damaging statements, or testify and seek to rebut them. Neither time, nor the benefit of counsel, for considering this choice could alleviate the 'damned-if-you-do-damned-if-you-don't' alternative" (A. 89).

II.

The Petitioner Harrison's Conviction Should Be Reversed and the Eight-Year-Old Indictment Against Him Should Be Dismissed for Violation of His Sixth Amendment Right to a Speedy Trial.

Perhaps no provision of the Bill of Rights is more ancient or more fundamental to the provision of justice than the Sixth Amendment's command that

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . ."

As pointed out in the scholarly opinion of Judge Thomsen in the celebrated case of *United States* v. *Provoo*, 17 F.R.D. 183, 196 (D.C.D. Md.), *aff'd*, 350 U.S. 857 (1955):

> "The right to a speedy trial is of long standing and has been jealously guarded over the centuries. Magna Carta states: 'To no one will we sell, to no one deny or delay, right or justice.' This provision was implemented by special writs of jail delivery and later by commissions of general jail delivery, under which special judges cleared the jail twice a year."

The underlying reason for the right, as stated by Sir John Davies three and one-half centuries ago, is that

> ". . . deleyinge the subjects dayes, weakes, and sumtyme termes, racketh the subject lamentably."[10]

In Great Britain this right is sturdily enforced not only at the trial level but also on appeal, with final disposition by the appellate court coming within four to six weeks after trial in criminal cases.[11] In this country appeals are much slower. A fairly recent survey stated that in the United States Court of Appeals the interval between the filing of a notice of appeal and its final disposition varied from a low of 6.3 months in the First Circuit to a high of 11.8 months in the Eighth Circuit. Comparable periods for state courts varied from 5 months to 18, with the lapse between

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[10] Quoted in Barnes, Due Process and Slow Process in the Late Elizabethan-Early Stuart Star Chamber, 6 American Journal of Legal History 221, 222 (1962).

[11] See Holtzoff, Expeditious, Efficient Justice: Observations on English Appellate Procedure, 44 ABA Journal 221, 222 (1958); Holtzoff, A Visit to the London Courts: The Administration of Justice in England, 42 ABA Journal 29, 31 (1956).

final argument or submission and the announcement of the decision of the appellate court ranging from 11 days in Nevada to 6 months in New Mexico.[12]

To no small extent a relatively relaxed attitude toward enforcement of the right of speedy trial seems to have been fostered by this Court's frequently quoted pronouncement in *Beavers* v. *Haubert,* 198 U.S. 77, 87 (1905), that

> "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. It cannot be claimed for one offense and prevent arrest for other offenses; and removal proceedings are but process for arrest,—means of bringing a defendant to trial."

The last sentence above—the holding of the case—is universally omitted when this case is quoted to justify delay in criminal proceedings, but it should not be for it gives to the generalities preceding it a content quite different from the use generally made of them. Beavers was seeking to use the Sixth Amendment to preclude his removal to Washington, D. C., for trial on one set of charges before he was tried in New York on other charges and the Court ruled that the right of speedy trial did not require such a course. That is all *Beavers* v. *Haubert* held and its general language had nothing to do with the question of unnecessary delay in federal proceedings or the amount of delay that might be considered necessary.

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[12] Appellate Delay in Criminal Cases: A Report, Committee on Appellate Delay in Criminal Cases of the Section of Criminal Law of the American Bar Association, 2 American Criminal Law Quarterly 150 (1964).

Neither is the instant case similar to cases such as *United States* v. *Ewell*, 383 U.S. 116 (1966), and cases therein cited, where delay involved in collateral attack long after conviction has been found not to violate the prisoner's right to a speedy trial. This case involves, rather, the question of how much delay the Sixth Amendment permits in the disposition of cases falling within the normal procedural steps of appeal and re-trial.

Counsel has been unable to find a case in which the Court has addressed itself to this question. But this case demonstrates the need for exercise of the Court's supervisory power to require more scrupulous adherence by the Court of Appeals to the Sixth Amendment's command of a speedy trial. The petitioner Eddie Harrison has been held in jail since March 28, 1960, because of the offense for which he stands accused in this case. During much of this time—some 45 months—his case was before the Court of Appeals awaiting decisions that were too long in coming.

The first period of delay was the twenty-one month lapse between July 21, 1961, when the Court of Appeals made clear by order that Harrison was entitled to a second trial, and April 22, 1963, when that trial actually commenced. In the first opinion in this case, the Court of Appeals attributed this delay to three items, none of which excuses the delay.

The first of these items was the refusal of the prisoners to move the court for a new trial to which the court had said they were entitled when it discovered that they had been represented by an impostor rather than an attorney at the first trial (A. 15; 359 F.2d at 217). The petitioner's

refusal to take this step stemmed from the fact that he did not want to waive his claim of double jeopardy. The court was well aware of that fact and the United States Attorney argued at the time that such a claim could be made by the petitioner if it was not foreclosed by the court (A. 7). The words of Mr. Justice Holmes were apropos in this situation:

> "[I]t cannot be imagined that the law would deny a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States." *Kepner* v. *United States*, 195 U.S. 100, 135 (1904) (dissent).

Yet the court kept Eddie Harrison on death row for eleven months, denying him a speedy trial to which it knew he was entitled, awaiting waiver of his right to be tried but once. That delay was at least unnecessary if not actually oppressive, and certainly should not be charged against Harrison in any assessment of the cause of the delays in this case. Once it was decided that the original conviction was defective, *i.e.*, on July 21, 1961, Harrison "was entitled to a new trial as reasonably soon as circumstances would permit." *United States* v. *Gunther*, 259 F.2d 173, 174 (D.C. Cir. 1958). That the circumstances here, unusual as they were, permitted a new trial in less than 21 months is manifest.

The second cause of delay mentioned by the Court of Appeals was "a series of defense motions, some purportedly of substance, some procedural, but all contributing to delay" (A. 16; 359 F.2d at 217). Again the court has attributed more delay to the defendants than seems warranted. As the opinion notes, a new trial was granted by the court on June

12, 1962, yet counsel was not appointed for Harrison until October 30, 1962. Hence more than four months' delay cannot rightly be attributed to him. And the motions mentioned in the opinion that can be attributed to him involved little delay: Attorney David sought only a thirty-day continuance to obtain a transcript of the first trial and Harrison's motion for new counsel was granted within that thirty-day period.[13] Thus the petitioner or his court-appointed counsel was directly responsible for only one month of the twenty-one-month delay from the time that the need for a new trial became apparent until the trial began. The remaining delay was attributable to the failure of the judicial processes to function expeditiously.

Nor can this failure be excused by the third item mentioned in the opinion—the fact that Harrison's co-defendants "engaged the impostor" in the first place (A. 16; 359 F.2d at 217). Surely it was the fault of the courts, not the defendants, if fault is to be assessed for the fact that an impostor was allowed to practice law in the District of Columbia courts. At least that must be so as to Harrison, for whom the impostor acted by appointment of the court after his own attorney's death (A. 5).

The subsequent delays in the case, totalling 55 months to date, are nowhere attributed to the petitioner Harrison by the Court of Appeals, nor could they be. The first such delay was the 30 months between sentencing after the second trial and decision of the appeal from that trial. Harrison was sentenced on June 14, 1963, counsel was appointed

[13] Attorney David's motion was filed on January 17, 1963, and new counsel was appointed Harrison on February 8. This motion and order, not printed in the Joint Appendix, are in Volume 2 of the record, which does not have numbered pages.

for him on July 25, 1963, his brief was timely filed on September 16, 1963, and the case was argued on December 18, 1963. There the matter rested for some 18 months, after which the court, without having issued an opinion, ordered rehearing *en banc* on one question. There followed another lapse of six months, after which the court issued its first opinion reversing the convictions because of use of inadmissible confessions. It was argued below that this delay of two years in deciding a case already three years old violated the petitioner's right to a speedy trial, but the opinion brushed this contention aside, indicating that the "appellants' position reflects but scant recognition of the exigencies of appellate review in abnormal cases" (A. 73). This opinion itself was the result of six months' deliberation, from oral argument on November 16, 1966, to opinion issuance on May 18, 1967, and a further two and one-half months were required for preparation and disposition of the petitioner's petition for rehearing, bringing the total time for this case to 87 months before final disposition by the Court of Appeals, of which some 57 months were spent in that court's processes and 45 months on its deliberations.

Delay of this magnitude would not be tolerated by the Court of Appeals if it were occasioned by the District Court or the prosecutor. See, *e.g., Hanrahan* v. *United States,* 348 F.2d 363 (D.C. Cir. 1965); *Marshall* v. *United States,* 337 F.2d 119 (D.C. Cir. 1964); *Taylor* v. *United States,* 238 F.2d 259 (D.C. Cir. 1956); *United States* v. *McWilliams,* 163 F.2d 695 (D.C. Cir. 1947). *Compare, King* v. *United States,* 265 F.2d 567 (D.C. Cir.), *cert. denied,* 359 U.S. 998 (1959). Nor should it be tolerated in the Court of Appeals itself. The long delay in this case was unnecessary; it was

not caused by the petitioner; and it denied him the speedy trial that the Constitution guarantees him and all citizens.

Conclusion

The petitioner's conviction should be reversed, the indictment against him should be dismissed and he should be released from the D. C. Jail forthwith.

Respectfully submitted,

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by Appointment of This Court